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COURT OF CRIMINAL APPEALS
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PD-1042-18
In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
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No. 01-16-00768-CR
In the Court of Appeals
For the First District of Texas
At Houston

———♦———

No. 1487627
In the 338th District Court
Of Harris County, Texas

———♦———

Ruben Lee Allen
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on the Merits Regarding Appellant's Petition for Discretionary Review

———♦———

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Identification of the Parties

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Trial Court:

Renee Magee, presiding judge

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Statement of the Case

The appellant was indicted for aggravated robbery. (CR 22). The indictment alleged a prior felony conviction. (CR 22). The appellant pleaded not guilty, but a jury found him guilty as charged. (4 RR 5; CR 111). The jury found the enhancement allegation true and assessed punishment at twenty-five years' confinement. (CR 121). The trial court certified the appellant's right of appeal, and the appellant filed a timely notice of appeal. (CR 127, 130).

On original submission, a panel of the First Court affirmed the appellant's conviction, but held unconstitutional Code of Criminal Procedure Article 102.011(a)(3) and (b) — which assess a court cost in the amount of $5 per witness summoned, and 29¢ per mile a peace officer travels to summon witnesses — and modified the trial court's judgment to delete part of the assessed court costs. The State moved for *en banc* reconsideration. The panel withdrew the opinion and issued a new, published opinion on August 30, 2018, this time affirming the trial court's judgement in all regards. *Allen v. State*, ___ S.W.3d ___, No. 01-16-00768-CR, 2018 WL 4138965 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted). One justice — the author of the

original opinion — dissented on rehearing. *Id* at *10 (Jennings, J., dissenting).

This Court granted both the appellant's and the State's petitions for discretionary review. This brief regards the appellant's ground for review.

Appellant's Ground for Review

Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?

Statement of Facts

The facts of the appellant's offense are not relevant to the issues he raised on appeal. It suffices to say that the appellant and two other people robbed a pharmacy at gunpoint. (4 RR 28-34, 170-75).

Summary of the Argument

The First Court held that *Salinas*, which requires an appellate court to track down the precise destination of court-cost funds before it may declare the court-cost constitutional, does not apply to court

costs that, based on their names, are recoupment of money that the government spent on the prosecution. Here, the challenged court cost was a fee for a peace officer summoning witnesses, so the First Court held it was constitutional without regard for where the money was directed.

This is not a *necessary* interpretation of the *Peraza-Salinas* rule, but it is the only way to interpret the rule consistent with *Peraza's* stated intent to expand the realm of permissible court costs. The appellant's proposed rule would use the *Peraza-Salinas* rule to strike down the core category of court costs that has been presumed constitutional since before the current constitution was adopted.

The State's preferred disposition of this case is for this Court to abandon the *Peraza-Salinas* rule in its entirety. The State will use the procedural history of this case to illustrate how, in practice, the *Peraza-Salinas* rule creates a presumption of unconstitutionality. Because the *Peraza-Salinas* rule puts the onus of proving constitutionality on the State and the appellate court, it has created a deluge of litigation.

Argument

Peraza stated that its intent was to expand the realm of permissible court costs. The First Court's interpretation of the *Peraza-Salinas* rule is consistent with that stated intent.

In its three leading court-cost cases this Court created a conundrum. This Court began by approving only of court costs that were a direct result of the defendant's trial, but, at the time, this Court seemed not to care where the money went once these court costs were collected. This Court then purported to expand the realm of permissible court costs to allow the Legislature to assess fees to fund criminal justice programs unrelated to the defendant. But this Court required there be explicit statutory language sending the money to the approved purpose. In this case, the First Court was forced to address a question this Court created: Does the new requirement of tracking court-cost money apply to a court-cost that would have passed muster under the old test because it was directly recouping an expense of the defendant's trial?

I. On its face, it is unclear how the *Peraza-Salinas* rule applies to court costs that recoup the cost of a defendant's trial.

In *Ex parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942), this Court struck down a $1 fee that was assessed against certain defendants. As a reason for its holding, this Court held that a cost that was "neither necessary nor incidental" to a criminal trial was impermissible. At the time of that opinion, there were numerous court costs that required defendants to reimburse the government for its expenses, and apparently all of that money went into the government's general funds. *See e.g.,* TEX. CODE CRIM. PROC. arts. 1018, 1029 (1925) (state must pay certain fees to sheriff, including 50¢ for summoning or attaching a witness, and 5¢ per mile travelling to summon witnesses; defendant had to reimburse state for fees paid for trial, and money "shall be deposited into the State Treasury"). *Carson* had nothing to say about these court costs, but the implication of the opinion was that they were permissible.

In *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), this Court was faced with a court cost that plainly did not meet the *Carson* test, namely a fee that on its face did not recoup the costs of a trial, but was divided between funding a criminal justice planning account and

the collection of DNA samples. The *Peraza* court concluded that, since the time of *Carson*, "the prosecution of criminal cases and our criminal justice system have greatly evolved," and the *Carson* test was "too limiting" for the sort of court costs that were now appropriate. *Peraza*, 467 S.W.3d at 517. *Peraza* announced that:

> if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.

Ibid.

Two years later, this Court emphasized that whether a court cost is allocated for a "criminal justice purpose" is a question "determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose." *Salinas v. State*, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017).

Both *Peraza* and *Salinas* addressed court costs that were not directly related to the expenses of a defendant's trial. Costs that recouped the expenses of a trial — such as the witness summoning fee — were implicitly approved of by *Carson* and had never been questioned. And *Peraza*, by its terms, sought to expand the realm of

permissible court costs. But *Salinas's* requirement of tracking down the statutory destination of the money was written in blanket terms. Is it the case that this Court, in expanding the realm of permissible court costs to include extraneous costs such as funding a criminal justice planning account, had actually struck down the core class of recoupment court costs that had always been permissible?

II. The First Court took *Peraza* at its word that it was expanding the realm of permissible court costs, and therefore *Salinas's* requirement to track the money did not apply to the sort of recoupment court costs that were permissible under *Carson*.

In this case, the appellant used the *Peraza-Salinas* rule to challenge the witness summoning fee. The First Court, on rehearing, recognized the conundrum created by applying the *Peraza-Salinas* rule to recoupment court costs and sought to figure out this Court's real intentions.

The First Court looked at the language in *Peraza* describing the *Carson* rule as "too limiting." *Allen v. State*, ___ S.W.3d ___, No. 01-16-00768-CR, 2018 WL 4138965, at *7 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted). From this, the First Court determined that, because the point of *Peraza* was to expand the realm

of permissible court costs, costs that were permissible under *Carson* would remain permissible. Therefore, the First Court reasoned, *Peraza* had created two categories of permissible court costs: "(1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice-costs." *Ibid*. The first of these categories were costs that had been permitted by *Carson*, the second were costs that had been prohibited by *Carson* but permitted by *Peraza*. The First Court held that the witness-summoning fee fell into the first category and was therefore constitutional, regardless of where the money was directed.

III. The appellant's argument consists of taking the *Peraza-Salinas* rule by its barest terms and applying it to all court costs. This Court should reject this position.

The appellant's argument in his brief is straightforward: *Peraza* and *Salinas* announced blanket rules, therefore they apply to all court costs. (Appellant's Brief Regarding Appellant's Petition at 11-16).

The State's first response to this is that this Court should abandon the *Peraza-Salinas* rule altogether, as those cases have no

basis in the Texas constitution. This argument is covered in the State's brief regarding its petition for review.

If this Court stands by *Peraza-Salinas*, it should follow the First Court's lead and decline to apply this rule to court costs that recoup the expenses of the trial. *Peraza* and *Salinas* both addressed costs that were not recoupment of expenses. Both of those cases are silent about recoupment court costs, but recoupment costs had been acceptable under *Carson* and both *Peraza* and *Salinas* evinced a desire to expand the realm of permissible court costs from what had been permitted by *Carson*.

This Court's stated concern in both *Peraza* and *Salinas* was that collecting court costs not directed to the criminal justice system somehow turned the courts into executive branch "tax gatherers." If this Court's concern is to restrict the judiciary's activities to judicial functions, which of the following sounds more like a judicial function: 1) Collecting a fee to prospectively fund a tangentially related program, or 2) Requiring a losing party to reimburse the prevailing party for part of the expense of litigation and allowing the prevailing party to spend this recouped money as it sees fit?

The requirement that convicted defendants reimburse the government for at least part of the cost of their prosecution has remained a constant of Texas law since the days of the Republic. Oliver Cromwell Hartley, *Digest of the Laws of Texas* (1850), 400 (1836 law requiring as much), 1371 (1848 law requiring as much); TEX. CODE CRIM. PROC. art. 956 (1856); TEX. CODE CRIM. PROC. art. 1061 (1879); TEX. CODE CRIM. PROC. art. 1018 (1925); TEX. CODE CRIM. PROC. art. 1018 (1965).[1] This money seems to have been directed to the general fund; at any rate, prior to *Peraza* there is no indication that any court of this state concerned itself with where this recouped money went.

Other than using the bare language of *Peraza* and *Salinas*, the appellant offers no argument in his brief why the novel *Peraza-Salinas* rule should suddenly apply to recoupment court costs that have been of unquestioned validity for nearly two centuries. Whatever the merits

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[1] The Legislative Reference Library of Texas has pdf copies of the 1856 Penal Code and Code of Criminal Procedure (*i.e.* "the Old Codes"): http://www.lrl.state.tx.us/collections/oldcodes.cfm. The code revisions of 1879, 1895, 1911, 1925, and 1948 are available from the State Law Library's website: https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/. The 1965 Code, as originally passed, is contained in the 1966 supplement on that page. The provisions relating to court costs were part of "Part II" of that Code, which is titled, "Miscellaneous Provisions." While the rest of the 1965 Code changed to the modern decimalized numbering system, Part II retained the old article numbers.

of the *Peraza-Salinas* rule as applied to court costs that prospectively fund programs, application of that rule to recoupment court costs is not appropriate.

This case illustrates how the *Peraza-Salinas* rule creates a presumption of unconstitutionality.

The general rule is that facial challenges to statutes are the most difficult to mount, because a claimant must prove that the statute operates unconstitutionally in all circumstances. *See Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). "[A]nalysis of a statute's constitutionality must begin with the presumption that the statute is valid and that the Legislature did not act arbitrarily or unreasonably in enacting it." *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013).

In practice, the *Peraza-Salinas* rule inverts this presumption: All a defendant need do is point to a court cost and claim that it turns courts into tax gatherers, and then the State's appellate counsel and the appellate court must go looking through interconnected statutes to find out if the money is directed toward a *Peraza-Salinas*-approved fund. If the State or the appellate court can affirmatively point to such a directed use, then the court cost will be upheld. If they cannot, the

absence of affirmative evidence showing a *Peraza-Salinas*-approved use of the money will result in striking down the statute. Thus, the effect of the *Peraza-Salinas* rule is to create a rebuttable presumption of unconstitutionality for every court cost.

The history of this case illustrates this point. When the appellant first raised his facial challenge, his claim that the witness summoning fee was deposited in the county's general fund was based, exclusively, on a report issued by the Office of Court Administration. (Appellant's Supp. Brief of Sept. 11, 2017 at 5-6) (citing Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) (hereinafter "OCA Report")). The State's appellate counsel — whose knowledge of government finances was about what one would expect from a prosecutor — accepted this report as an authority. As did the First Court, which, on original submission, relied exclusively on the OCA Report for its conclusion that the witness summoning fee went to the county's general fund.[2]

The State's appellate counsel did additional research, and filed a motion for rehearing pointing to a combination of statutes in the Local

[2] Much of the original opinion's reasoning has been preserved in the dissent. *See Allen*, 2018 WL 4138965 at *17-18 (Jennings, J., dissenting) (using OCA Report and a case that relied on the OCA Report as basis for believing that witness-summoning fee went to the general fund).

Government Code that seemed to require that any money collected as part of court costs assessed based on services rendered by officers be deposited into the salary fund of those officers. (State's Motion for *en Banc* Reconsideration at 5-7 (discussing TEX. LOC. GOV'T CODE §§ 113.021, 154.003, 154.023, and 154.042)). In that motion the State also point out that, upon closer analysis, the OCA Report cited to no authority whatsoever for its assertion. (*Id.* at 3-5).

The State's appellate counsel is not complaining about having to root through the Local Government Code — it is his job and he regrets not finding these statutes earlier. But the constitutionality of a statute should not depend on whether the statute's defender is willing and able to do an amount of research that is, in light of the sums involved, objectively unreasonable. *Compare Tyler v. State*, 563 S.W.3d 493, 503 (Tex. App.—Fort Worth 2018, no pet.) (upholding $25 prosecutor's fee as constitutional based on "painstaking review of the interrelated statutes that direct the $25 ultimately to payment of the prosecutor's salary.") *to Hernandez v. State*, 562 S.W.3d 500, 510-511 (Tex. App.—Houston [1st Dist.] 2017, pet. filed) (striking down same $25 prosecutor's fee as unconstitutional because OCA Report said

money went to general fund). That's the ultimate result of the *Peraza-Salinas* rule's presumption of unconstitutionality.

Conclusion

The State asks this Court to affirm the First Court's judgment on the bases argued in the State's cross-petition for review, namely that the Texas constitution's separation-of-powers provision does not impose stringent requirements on how recouped court-cost money is spent. If this Court chooses to retain the *Peraza-Salinas* rule, it should affirm the First Court's determination that court costs that recoup expenses associated with the defendant's trial need not be directed to any particular fund to be constitutional.

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